Supreme Court of the United States

October Term, 1948.

No. 792

INTERNATIONAL HARVESTER COMPANY, - - - - - - - - - Petitioner,

versus

NELLIE IRENE TROUTMAN, Administratrix of the Estate of Phillip A. Troutman, Deceased, - - - - - - Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

SUPPORTING BRIEF.

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May 16, 1949.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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October Term, 1948.

No. _____.

INTERNATIONAL HARVESTER COMPANY, - *Petitioner,*

v.

NELLIE IRENE TROUTMAN, ADMINISTRATRIX OF THE ESTATE OF PHILLIP A. TROUTMAN, DECEASED, - - - - *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, International Harvester Company, hereby petitions this Honorable Court for a writ of certiorari to be issued to review the judgment entered in the United States Court of Appeals for the Sixth Circuit on February 15, 1949. The petition for rehearing was denied on April 14, 1949. No opinion was rendered by the Court of Appeals.

BASIS OF JURISDICTION.

The Court of Appeals for the Sixth Circuit refused to abide by the unanimous decisions of the Kentucky Court of Appeals upon an important point of local law. That Court, without opinion, affirmed the refusal of the District Court to grant a directed verdict for International Harvester Company upon the ground of the contributory negligence of Troutman, although the facts showing such contributory negligence were clear and undisputed.

These rulings were based upon these Courts' idea that a verdict cannot be directed by a Federal Court upon contributory negligence.

These rulings are likewise in conflict with the decisions of other Circuit Courts of Appeal upon the same question.

The trial Court was also affirmed by the Court of Appeals in its refusal to grant International Harvester Company a new trial on the ground of newly discovered evidence—evidence which showed that the plaintiff's entire case and the verdict and the judgment were all based upon a misrepresentation. Every traditional requisite for a new trial under such circumstances was made and the denial of a new trial under those conditions was such departure from the accepted and usual course of judicial proceedings as to require the exercise of this Court's power of supervision.

These rulings invoke the jurisdiction of this Court accorded by Section 240 of the Judicial Code as amended (43 Stat. 938 Sec. 1; 28 U.S.C.A. Sec. 347).

The judgment of the United States Court of Appeals was entered on February 15, 1949.

The petition for rehearing was denied on April 14, 1949.

An order was entered on April 18, 1949, staying the mandate for thirty days therefrom pending filing of this petition.

Jurisdiction here is sustained by *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, 58 S. C. 817.

SUMMARY STATEMENT OF FACTS.

The facts are undisputed.

The appellee's intestate, Troutman, was employed as a carpenter for a construction company engaged on a construction job at the Louisville plant of International Harvester Company, hereinafter called "Harvester."

Troutman for months had been working as a carpenter on the ground and was working on the ground on June 11, 1947. His boss told him to climb up and plumb a door frame, the top of which was some 25 feet off the ground and near the conductor rails carrying 440 volts of electric power to an overhead traveling electric crane, belonging to and used by Harvester.

The crane, crane runway and conductor rails were all well designed, of a type commonly used and approved by industry in general and the National Electrical Code.

Harvester had no actual knowledge that Troutman or any other employee of the construction company

proposed to be or had reason to be near the angle iron conductor rails. It was the custom of the steel workers, employed by the steel erecting company, who were expected to be near the rails, to get Harvester to cut the power off when they were working close to the rails.

Troutman was warned at least six separate and distinct times* that the angle iron conductor rails were charged with electricity and that the situation into which he was proceeding was extremely dangerous because of the proximity of high voltage electric current.

In spite of these numerous warnings, which were continued from the time he left the ground until his accident, Troutman climbed up some 25 feet above the ground and put his hand or foot upon the charged rails, received an electric shock and fell to the ground, as a result of which he died on the following day.

A verdict of $17,000 was rendered.

Throughout the trial the emphasis of the plaintiff's case was that Troutman was a simple carpenter, unacquainted with electricity and inexperienced with electrical machinery. That was stressed by the plaintiff below in the evidence. It was the principal basis of plaintiff's counsel in his argument to the jury. It was the sole and only explanation suggested by the trial Court in its opinion for Troutman's reckless failure to heed the warnings.

After the trial, but the same day it was concluded, it was discovered that Troutman in fact was an *ex-*

*Probably more.

perienced electrical machinist and had actually worked for a year shortly prior to his death as an electrical machinist engaged in the operation of complicated electrical equipment, including an overhead traveling *electrical crane* similar to that upon which he met his death.

Harvester and its counsel learned of this experience only by accident after the trial.

However, prior to the trial in an effort of ascertaining *inter alia* what Troutman's qualifications and experience had been, Harvester's counsel took the deposition of the plaintiff and by that deposition was given to understand by the plaintiff and her counsel that Troutman had worked *as a carpenter* for years preceding his death and the fact was not divulged that shortly before his death he had worked for a year as an electrical machinist and had actually operated a similar electric crane.

There is no hint of any dispute with respect to these pointed, careful and repeated warnings; in fact, witnesses for Troutman's Estate testified about them.

There is no dispute about the great stress laid by plaintiff on Troutman's purported inexperience. It shows in the evidence, in uncontradicted affidavits, and in the trial Court's opinion.

QUESTIONS INVOLVED.

The questions involved here are:

(1) Is it the law that Federal courts *cannot* direct a verdict upon contributory negligence in any case?

(2) Can the Federal courts refuse to follow the settled and governing decisions of the highest court of the State in which the accident occurred and the case was tried, by determining a question of local law in a common law case in direct conflict with the unanimous decisions of that highest State Court?

(3) When one Circuit Court of Appeals—in this instance the Sixth Circuit—decides a case in direct conflict with Courts of Appeal for the other circuits, is not certiorari here the appropriate and only recourse?

(4) May a Federal trial Court, even under its broad discretionary powers in such matters, deny a motion for a new trial, supported by all of the traditional prerequisites, when the effect of such refusal is to permit a recovery upon a complete misrepresentation permeating the entire case?

REASONS FOR ALLOWANCE OF WRIT.

The reasons for certiorari briefly stated are:

(1) This Court should either expressly approve or expressly condemn the novel law in the Sixth Circuit that a verdict *cannot* be directed upon contributory negligence in the Federal courts.

(2) This Court should not permit machinery of the federal judiciary to be employed in aid of a misrepresentation.

CONCLUSION.

For the reasons herein set forth we most respectfully pray for a writ of certiorari.

HUBERT T. WILLIS,
Attorney for Petitioner.

MIDDLETON, SEELBACH, WOLFORD,
WILLIS & COCHRAN,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

To be direct and concise, as required by the Court's rulings, we shall not elaborate the short summary of facts as stated in the preceding petition for certiorari.

The important facts are:

(1) Troutman was warned at lease SIX times of the danger to which he was subjecting himself. He recklessly ignored these warnings and risked the consequences.

(2) The entire trial, arguments, verdict and judgment were based upon a misrepresentation of the fact* of Troutman's knowledge of and experience with electricity and electrical equipment, including particularly an overhead traveling electrical crane similar to that upon which he was killed.

The chief principles of law towards which the Court's attention is directed are these:

(1) Kentucky, through its highest Court, has consistently held in electrical cases that where one is warned of the danger and proceeds into it, he is guilty of contributory negligence as a matter of law and the Court must direct the verdict of the jury against him.

*No charge was made below and none is made here that this misrepresentation was willfully or fraudulently made by either the plaintiff or her counsel. It may have been innocent and inadvertent.

(2) It is the Kentucky law which the Federal courts, quite as truly as the State Courts, are bound to ascertain and apply. There is no such thing as a Federal common law applicable in such cases.†

(3) One Circuit Court should not depart from the law as consistently established in other circuits.

(4) No Court, Federal or State, even in matters of broad discretion, should lend itself to a judgment based upon misrepresentation of fact throughout the trial.

ARGUMENT.

I.

Is It the Law That Federal Courts *Cannot* Direct a Verdict Upon Contributory Negligence in any Case?

At the close of the plaintiff's evidence in the trial Court and at the close of all the evidence, Harvester, as defendant there, made timely motions for a directed verdict, and after the verdict made a timely motion for a judgment notwithstanding the verdict. All of these motions were denied by the trial Court.

These motions were based upon Harvester's theory there that:

(1) No negligence against it had been shown;

†Direct quotation from *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 at p. 65, with the substitution of the word "Kentucky" for the word "Pennsylvania."

(2) Troutman was guilty of contributory negligence.

Both of these points were pressed before the Sixth Circuit by briefs and argument without avail.

The first point, with respect to Harvester's primary negligence, we have advisedly waived here by omitting reference to it in our petition for certiorari—not because we are any the less confident of its propriety, but solely in order to concentrate this Court's attention upon the more substantial points to be pressed here.

The lower Court wrote an opinion which is copied in the appendix to this petition and brief. The Court of Appeals rendered no opinion.

The trial Court's opinion makes no express reference to its theory, or perhaps "doubt," with respect to this Court's tendency to disapprove a directed verdict, by any Federal court, in any case, upon contributory negligence.

The feeling, however, that this Court disapproves the direction of a verdict by any Federal trial court in any case upon the ground of contributory negligence was orally expressed by the trial Court here and the text of the opinion clearly reflects that feeling and can only be explained by it.

The judges of the Court of Appeals for the Sixth Circuit who heard the argument in this case had the same feeling and at the oral argument in that Court suggested to counsel as an indication of this Court's tendency in that direction, its decision in the case of

Wilkinson v. *McGarvey* (decided January 31, 1949, but not yet officially reported), to which express reference upon the point was made by Judge Martin.

The groundlessness of this feeling and the inapplicability of this case was expressly called to the attention of the Court of Appeals in Harvester's petition for rehearing subsequently filed.

That the feeling of the Court of Appeals remained unchanged, notwithstanding this express reference to it and argument against it, is shown by its denial of the petition for rehearing, without opinion.

The law in Kentucky is and always has been exactly the opposite. That law must be followed in the Federal courts in such a case as this—or so this Court has declared.

The law in the other circuits so far as we can discover is and always has been the same as in Kentucky. We have not found that this Court has recently expressed itself upon the subject, but under the circumstances we refrain from comment upon this Court's earlier decisions aligned with the Kentucky decisions and aligned with the decisions of the other Circuit Courts of Appeal.

Lawyers in general (and in particular in this case), have relied upon the decisions in Kentucky and in the Federal courts heretofore deciding that a common law case in Kentucky, clear and undisputed contributory negligence barred recovery, and have so advised their clients. People in business have relied upon the advice of counsel predicated upon these authorities.

If the trial Court in this case and the Sixth Circuit are correct in their feeling of this Court's view of the law, and if these numerous authorities are no longer deemed reliable, then this Court should set the matter at rest by determining the matter once and for all.

For this Court now to hold, however, that contributory negligence does not bar a recovery in the Federal courts in Kentucky, it seems to us that this Court must reverse its decision in *Erie R. Co.* v. *Tompkins,** and the subsequent cases based upon that decision.

We believe that the lower Federal courts in this case are wrong in their view of the law to be applied in Kentucky, but if they are right, that law should be clearly stated by this Court and not simply be applied obliquely and hesitantly by the Federal trial courts.

II.

Can the Federal Courts Refuse to Follow the Settled and Governing Decisions of the Highest Court of the State in Which the Accident Occurred, and the Case Was Tried, by Determining a Question of Local Law in a Common Law Case in Direct Conflict With the Unanimous Decisions of that Highest State Court?

We repeat that there is no dispute of the number and nature of the warnings given to Troutman just befor his accident.

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*304 U. S. 64.

(1) Troutman was *warned* as he left the ground.

R.,† pp. 78-79—Defendant's witness Rosser:

"I had warned him personally before he went up that the rails up there was hot and to watch the rails when he got up there."

(2) He was *warned* as he started to climb.

R., p. 49—Plaintiff's witness Lewis:

"He climbed up over there and started climbing up the wall . . . I said, 'Look out, mister, all of that stuff is hot up there.' "

(3) He was *warned* when half-way up.

R., p. 84—Defendant's witness Miles:

"When I saw him, he was on his way up there, about half-way up . . . I heard one of the fellows holler at him and tell him to watch that hot rail up there."

(4) He was *warned* again as he proceeded farther.

R., p. 86—Defendant's witness Nally, a steel man, working near the top of the door, who said as Troutman climbed past him:

"I told Mr. Troutman that the rails were hot and motioned with my head toward this girder because I was holding with both hands."

(5) He was *warned* when he reached the top of the door.

R., p. 33—Plaintiff's witness, Troutman's buddy, George Hite:

"When he got up there to the first head, the head of this door . . . I said, 'Dutch,* they

†Abbreviation for "Transcript of Record."
*Troutman's nickname.

they say that is hotter than hell up there. Be careful.' He said, 'O.K. George'."

(6) He was warned as he neared the conductor rails on the crane rail beam.

R., pp. 71-72—Defendant's witness Schilt:

"Mr. Troutman was climbing the steel here and had got up to a point where he was approaching the bottom flange to this crane rail beam . . . I hollered at the man and possibly said 'Watch that angle' or something like that . . . at the time I hollered at him, I believe I would be safe in saying there was possibly six or eight other workmen hollering at him and he told them he was told about the rails before he left the ground."

(7) After he had gone above the conductor rails and as he started back down toward them, he was again *warned.*

R., p. 87—Defendant's witness Nally:

"I was standing opposite of him right straight across the beam . . . and I told him, 'Skipper, look out, those damn rails are "hot." You don't have to touch them, they will jump out and get you.' He said, 'Yes, I respect them' and went ahead and put his foot on the bottom rail, that was his left foot, right foot on the middle rail, his hand on the top track and reached over and got hold of this girt."

In addition to these six or seven specific, direct and pointed warnings, there is evidence of general warnings to Troutman of the danger into which he was going, which came from numerous workmen (R., pp. 33, 50, 62, 71, 79, 84).

Under such circumstances the Court of Appeals of Kentucky has consistently, expressly and repeatedly held in cases of injury or death by electricity, that such reckless risk-taking in spite of such warnings is such contributory negligence as a matter of law as will bar recovery.

To keep this discourse brief, we cite but do not quote these Kentucky cases:

Capital Gas & Electric Light Co. v. Davis, Adm'r., 138 Ky. 628, 128 S. W. 1062.

Citizens Telephone Co. v. Westcott's Adm'x, 124 Ky. 684, 99 S. W. 1153.

City of Owensboro v. Winfrey, 191 Ky. 106, 229 S. W. 135.

City of Owensboro v. York's Adm'r, 117 Ky. 294, 77 S. W. 1130.

These cases announce the rule universally applied in Kentucky that an adult, who is warned of the danger of electricity near, even though he is inexperienced in its powers and properties, who ignores those warnings, proceeds into danger and is injured, is guilty of such contributory negligence as a matter of law that he cannot recover.

We quote the additional and recent case of *Ky. & W. Va. Power Co.* v. *Brown's Adm'x,* 281 Ky. 133, 135 S. W. 2d 70, because there it is held that the warning need not be of such character as to state the certainty of danger, but it is sufficient if the warning is only such as to create a state of doubt as to whether the condition or situation is dangerous. The Court of Appeals there said:

". . . the character of the decedent's act in taking hold of the wire, under the circumstances stated, was not left to our conclusion to be drawn solely from his conduct, as to whether or not it showed him guilty of contributory negligence, but we further have his question asked of his companion, Williams, at the time of his taking hold of the wire, as to whether there was any 'juice' in it, to which inquiry Williams, showing his own doubt as to this, answered that he did not know.

"Clearly, this statement, which accompanies the decedent's act, was admissible as a part of the *res gestae* and in itself showed that decedent, *when in such a state of doubt, as to the dangerous condition of the wire,* did not exercise ordinary care for his own safety in taking hold of it.

". . . the decedent, both by his rash conduct and his statement made in connection with his rash conduct, conclusively showed himself guilty of such contributory negligence as not only warranted, but required, the trial court's sustaining appellant's motion for a peremptory instruction."

Because it is peculiarly appropriate in this case, we refer also to the case of *Morton's Adm'r* v. *Ky.-Tennessee Light & Power Co.,* 282 Ky. 174, 138 S. W. 2d 345. There an employee of the Highway Commission working on a bridge was electrocuted by voltage of the defendant company. The deceased was on top of the steel superstructure of the bridge. The defendant's high tension wires were on a level with the top of the bridge but about 11 feet away. The deceased was removing a steel rod from the bridge and in doing so extended it out away from the bridge far enough to

touch the wire and he was killed. His estate charged negligence against the company for maintaining the wires too close to the bridge without protection and without warning.

The Kentucky Court of Appeals makes this statement which is peculiarly apt here:

(Ky., p. 176)

> "The deceased had been at work on the highway and bridge for two or three weeks and *his fellow workmen testify to their knowledge of the dangerous nature* of the line. *The deceased, an intelligent man, is chargeable with the same knowledge.*"

The Kentucky Court of Appeals affirmed the lower Court's judgment for the defendant on a directed verdict.

Troutman's numerous fellow workers, who warned him, knew the danger. Troutman, under Kentucky law, was charged with the same knowledge.

It is significant, however, in this connection, as was learned after the trial, that Troutman knew the danger even better than these fellow-workmen since he had been an electrical machinist and actually operated a similar overhead traveling electrical crane.

If it is the sense of this Court that *Erie R. Co.* v. *Tompkins, supra,* is still sound, then it was the clear duty of the Court of Appeals for the Sixth Circuit and its mandate from this Court, to apply the Kentucky law as expressed in those cases.

When the trial Court and the Sixth Circuit Court refused to recognize and apply this Kentucky law as

expressed by its highest Court, they invaded rights which are reserved by the Constitution to the several States and deprived your petitioner of rights guaranteed to it under the Constitution. (See *Erie R. Co.* v. *Thompkins,* 304 U. S. at p. 80.)

III.

When One Circuit Court of Appeals—in This Instance the Sixth Circuit—Decides a Case in Direct conflict With Courts of Appeal for the Other Circuits, Is Not Certiorari Here the Appropriate and Only Recourse?

The Court of Appeals for the Sixth Circuit used to hold with the other Circuit courts that the law was the same as it has been consistently declared by the Kentucky courts. In the decision by the Sixth Circuit of the case of *Monongahela West Penn. Public Service Co.* v. *McNutt,* 13 F. 2d 846, this same circuit there said, in a case in which a man working for an independent contractor climbed up and worked around an electric wire after having been warned about it, and was subsequently injured by it:

> "It does not appear that any responsible officer of the company knew that he was building this platform, and the subordinate employee who did know it *warned him that the wires were dangerous.*
>
> . . . . . .
>
> *"The case is equally clear as to McNutt's negligence.* Not only is the highly dangerous character of such wires now a matter of common knowledge, but *McNutt admits the warning. He qualifies it*

only by saying that he did not know, and was not told, that there was danger, unless he actually touched the wire. It might be admitted that he did not know, or was not bound to know, that electricity will arc and jump, *yet his conduct showed entire recklessness.* Taking his binding wire in his hands, reaching out and up, and swinging it within a couple of inches of the high tension wire —as he said he did—there was great danger of actual contact. His contention that, although he was grossly negligent in the subject-matter, yet that the very injury, to which he knew he was exposing himself by the slightest slip or miscalculation, happened in a slightly different way from that which he had in mind, *cannot be accepted as exculpatory.*"

Although this case is peculiarly and specifically appropriate, the Sixth Circuit apparently felt that it does not express the law as it exists today.

The Sixth Circuit did not only refuse to follow its own precedents, which may not be material in the proceeding now before this Court. It also expressed, by its decision in the case at bar, a rule in conflict with decisions on the same subject in cases of the same character in other circuits, and that *is* material in this proceeding before the United States Supreme Court.

It is not necessary or appropriate to digest or quote numerous cases from other circuits which state the law exactly as stated by the Kentucky Court of Appeals, but a few of such cases may be mentioned:

Frank v. Suthon, 159 F. 174 (District Court of Louisiana).

Coffman v. Southern Coal Co., 52 F. S. 351 (District Court of Florida).

Anderson v. Southern Rly. Co., 20 F. 2d 71 (4th Circuit).

Barnett v. Des Moines Electric Co., 10 F. 2d 111 (8th Circuit).

We quote as particularly appropriate only the case of *Kelly* v. *Duke Power Co.*, 97 F. 2d 529, 4th Cir.:

> "The uncontradicted evidence shows that the deceased's foreman on Saturday before the fatal accident on Monday told Kelly to paint the end of the building and the steel girders up to the platform on which the transformers were stationed—pointing out the place—and *warned him not to get on the roof or near the wires because it was dangerous;* that they would have the current cut off when he got ready to paint around the transformers. The deceased climbed a ladder in order to get on the roof and was painting the girder above the transformer platform when he came in contact with the current that killed him. . . .
>
> "*Of course the law of North Carolina controls. Erie R. Co.* v. *Tompkins,* 58 S. Ct. 817. . . .
>
> "If it could be assumed that the defendant was guilty of negligence in any particular, it is clearly established by the evidence that the proximate cause of the decedent's death was *his own want of due care,* and the nonsuit was proper."

Here plainly stated is the same determination in the Fourth Circuit of the same principle of law, declared so many times by the Kentucky Court of Appeals.

We call the Court's attention to the recognition by the Fourth Circuit, that under the law of the Erie Railroad case, the State decisions with respect to the barring of recovery because of contributory negligence as a matter of law, must be implicitly followed.

Only the Supreme Court of the United States can resolve this conflict between the Sixth Circuit Court of Appeals and the other Circuits.

IV.

May a Federal Trial Court, Even Under Its Broad Discretionary Powers in Such Matters, Deny a Motion for a New Trial, Supported by All of the Traditional Prerequisites, When the Effect of Such Refusal Is to Permit a Recovery Upon a Complete Misrepresentation Permeating the Entire Case?

The plaintiff below, the respondent here, and the widow of the deceased, Phillip A. Troutman, on her pre-trial examination by deposition testified (R., pp. 112-114) that for many years prior to his death in 1947 and during all or nearly all of the time since their marriage in 1938, her husband had been a carpenter and belonged to the Carpenters Union, which had a contract with an association of general contractors, and that for all or nearly all of that time since their marriage, he was on a job as carpenter for one or another of those contractors. Her counsel interpolated into the deposition a statement to the same general effect.

At the trial she testified:

(R., p. 13)

"Q. At the time he was injured what was his occupation?

A. *Carpenter work—construction.*

Q. How long had he been engaged as a carpenter?

A. 32 years.

. . . . . .

Q. Had he ever been a structural iron worker or worker with reference to installation or repairing of electrical appliances or electricity?

A. *No, sir, not as I know of.*"

She named numerous construction jobs upon which he worked as a *carpenter* (R., p. 13).

Yet, she did not mention the fact that Troutman had worked, and recently, *for a year,* for Tube Turns as a machinist operating electrical equipment, including an overhead traveling electrical crane.

Throughout the trial the evidence of the plaintiff was shaped to emphasize the danger of the angle iron conductor rails which supplied power to the crane, *to a person inexperienced with electricity and electrical equipment.* Efforts in this direction were made with nearly every one of the plaintiff's witnesses.

"The principal basis of the plaintiff's case and the *argument of plaintiff's counsel* was the assertion and argument that the plaintiff's intestate, Philip A. Troutman, had been a *carpenter,* and *as such* had worked for many years for construction contractors, and that he was *thoroughly unfamiliar with electricity*

or the hazards or dangers thereof and was *totally unfamiliar with the operation of an overhead traveling crane* and completely unaware of the method of supplying *electrical power* to such a crane."*

In the Court's opinion (R., p. 137) recognition of this emphasis in the evidence and stress in the argument was noted:

> "There was nothing in the *evidence* to indicate that the decedent Troutman had had any experience in working around an electrical crane and stress was laid upon the fact that he was not acquainted with such equipment and its dangers in the *closing argument* to the jury by Counsel for plaintiff."

In the Court's opinion it is suggested, as an explanation of Troutman's utter heedlessness of the numerous warnings given him, that he did not understand those warnings.

The entire case was tried and decided upon the untrue and misrepresented hypothesis that Troutman was experienced only as a simple carpenter and knew nothing about electricity or electrical equipment or electrical cranes.

The verdict and judgment is founded upon that untruth.

Entirely by accident, immediately after the verdict and by a curious coincidence (R., pp. 102-106) Harvester for the first time learned that from October, 1943, until October, 1944—less than three years prior to his

*From the uncontradicted affidavit of J. L. Richardson, Jr., R., pp. 102-3.

death in June, 1947—Troutman worked as an electrical machinist operating complicated electrical equipment, including occasionally, if not frequently, an overhead traveling electrical crane similar to that upon which he was killed.

Immediately after the verdict Harvester filed a timely motion for a new trial and numerous undisputed affidavits showing the true situation.

All of the traditional prerequisites for a new trial under such circumstances were presented to the trial Court.

A new trial was denied.

Trial courts have a broad discretion in granting or refusing new trials upon the ground of newly discovered evidence.

However, there is only indiscretion and not discretion in any Court, in permitting itself to be used as an instrument of wrong—as an aid to untruth—as a means of the imposition of a misrepresentation.

For a trial Court so to abuse its judicial discretion is such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision and correction.

We were entitled to a new trial:

Howell v. Standard Oil Co., 234 Ky. 247, 28 S. W. 2d 3.

Ill. Cent. R. R. Co. v. Frick, 256 Ky. 317, 76 S. W. 2d 13.

C. N. O. & T. P. R. Co. v. Snow, 284 Ky. 58, 143 S. W. 2d 863.

This Court will recall its decision in *Hickman* v. *Taylor,* 329 U. S. 495, in which this Court proudly said of the Federal judicial system:

> "Civil trials in the Federal Courts no longer need be carried on *in the dark.* The way is now clear . . . for the parties to obtain the fullest possible knowledge of the issues and facts before trial."

This case, however, was tried in the dark by your petitioner, upon purported facts that were not facts, with the evidence directed toward issues that were not properly in the case.

This was the fault* of the respondent.

It is a most grievous departure from judicial standards and proceedings for a trial Court to justify that fault and crown it with success.

CONCLUSION.

If the *Erie Railroad* case is still the law, it is controlling here, and the law of Kentucky should have been applied by the District Court and the Court of Appeals for the Sixth Circuit.

If that case still reflects this Court's view, then certiorari must be granted to compel obedience to the principles there stated.

The law of the Circuits other than the Sixth is the same as the law in Kentucky and the conflict between these Circuits and the Sixth can only be and should be resolved by this Court.

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*But no fraud is charged.

Litigants in the Federal courts are historically and constitutionally entitled to a trial upon the true facts. It is a most unsound and dangerous departure from judicial process for a trial Court to base its judgment upon known untruth. This Court's supervision and correction of such a judgment is the only remedy at this stage of the litigation.

The relief to be granted is for this Court to require, under Rule 50(b) of the Federal Rules of Civil Procedure, the entry of a judgment now for Harvester as if the requested verdict had been directed. Brunet v. S. S. Kresge Co., 115 F. 2d 713 (C.C.A. 7); Madden Furniture, Inc. v. Metropolitan Life Ins. Co., 127 F. 2d 837 (C.C.A. 5).

Respectfully submitted,

HUBERT T. WILLIS,
Attorney for Petitioner,
International Harvester Company.

MIDDLETON, SEELBACH, WOLFORD,
WILLIS & COCHRAN,
Of Counsel.

APPENDIX.

Opinion of the Trial Court, Dated April 10, 1948.

This action is now before this Court upon two motions, both filed by defendant and Third Party Plaintiff, International Harvester Company and Third Party Defendant Struck Construction Company.

The first motion to set aside the verdict of the Jury and to enter a judgment in favor of the defendant International Harvester Company, a procedure provided by Rule 50(b) of the Federal Rules of Civil Procedure, Title 28 USCA, following Section 723(c).

The second motion is to set aside the verdict of the Jury and the judgment entered thereon and to grant a new trial.

The action was filed July 7, 1947, by Nellie I. Troutman, Administratrix of the estate of her deceased husband Phillip A. Troutman, who died June 12, 1947, as the result of injuries received while employed as a carpenter by the Struck Construction Company in the construction of a building comprising part of the plant of the International Harvester Company, located on Crittenden Drive near Louisville, Kentucky.

The complaint, as amended, alleges that decedent was assisting in plumbing a door jamb and was working twenty-six feet above ground when he came in contact with an angle iron charged with a heavy voltage of electricity, which contact caused decedent to to fall and receive injuries which immediately caused his death.

The negligence alleged in the complaint, as amended, is (a) failure on the part of the defendant to place a guard around the angle iron charged with electricity, (b) failure to place a warning sign to indicate the danger, (c) failure to furnish decedent a safe place in which to work.

It is stated that decedent did not know and could not, by ordinary care have known, of the alleged dangerous

condition and that defendant did know or could have known the danger, by the exercise of ordinary care, and that defendant failed to warn decedent of the danger incident to doing the work at the place where he was directed by his foreman to go at the time he received his injuries.

A Third Party complaint was filed by the defendant International Harvester Company against the Struck Construction Company on October 17, 1947, in which it was alleged that the Construction Company was engaged by contract to do certain construction work on the Harvester Company's plant and that under and by virtue of the terms of the contract the former agreed to protect and save harmless the Harvester Company from any and all claims, damages, demands, etc., for injury, including death, to any person including servants and employees of the parties thereto.

Struck Construction Company filed its answer to the Third Party Complaint.

The answer of the Harvester Company to the petition of the plaintiff admitted the capacity of the plaintiff to sue and the corporate entity of the defendant Harvester Company; otherwise denying all the allegations of the petition and by an amended answer filed November 19, 1947, alleged that at the time of his injury, decedent Troutman, by his own negligence so contributed to his injuries and death that but for his negligence, the accident would not have occurred.

By a second amendment filed December 4, 1947, made the additional defense of assumed risk on the part of Troutman; alleged that the risk of electrical shock and fall which was claimed as the cause of his death, were among the risks assumed by the decedent in entering the employment of the Construction Company.

Upon the issues so made by the pleadings, the case came to trial to a Jury on December 15, 1947. The Jury returned a verdict for the plaintiff in the sum of $17,000 for which judgment was entered.

The Harvester Company seasonably filed its motion to set aside the verdict and the judgment entered thereon; to enter judgment for the defendant in accordance with its motion for a directed verdict made at the close of the introduction of all the evidence upon the trial.

In support of its motion, it was alleged that there was no evidence of negligence on the part of defendant International Harvester Company and that the evidence in the case showed conclusively that the injuries sustained by the decedent were the proximate result of his own negligence and that the verdict of the Jury was in direct violation of the instructions of the Court.

The reasons urged in the motion for a new trial were eleven in number, as follows:

1. The verdict is contrary to law.

2. There was no substantial evidence that the injury or death of decedent was the proximate result of any negligence of the International Harvester Company.

3. That the evidence conclusively showed that the death of decedent was the proximate result of his own negligence.

4. Error of the Court in permitting plaintiff to introduce certain evidence over defendant's objections.

5. Error of the Court in refusing to admit certain evidence offered by defendant.

6. Error of the Court in refusing to direct a verdict for the defendant.

7. Error of the Court in instructing the Jury that it was the duty of the Harvester Company to furnish decedent a reasonably safe place in which to work.

8. That the verdict is excessive.

9. That the verdict was against the weight of the evidence, both with respect to the absence of negligence on the part of the Harvester Company and with respect to the contributory negligence of decedent.

10. Newly discovered evidence.

11. Because the verdict of the Jury was arrived at by each member writing down on a piece of paper the amount which he or she believed the verdict should be and divided the total by twelve, which last named amount became the verdict of the jury.

Both counsel for the Harvester Company and for Struck Construction Company vigorously and ably contend that the motion filed pursuant to Rule 50(b) of the Rules should be sustained.

In support of the motion for a new trial they have limited their discussion to four of the eleven reasons assigned in the motion—that is—(1) the quotient verdict, (2) Newly discovered evidence, (3) The verdict was contrary to the evidence, and lastly, the Jury verdict was contrary to the instructions.

The decedent, Troutman, at the time of his death was forty-seven years old and had been employed by the Construction Company as a carpenter, largely in the construction of wooden forms in which the concrete was poured for foundations at the plant of the Harvester Company. The buildings were of steel construction and in the particular buliding where the accident occurred it was discovered that a door jamb was out of plumb and there had been some controversy between the steel construction workers and Struck's foreman as to whether the door jamb being out of plumb was the fault of Struck or the steel constructors.

Admittedly, before the building was completed, there had been installed equipment consisting of rails supported by angle irons which were charged with 440 volts of electricity. Upon these rails, there was operated an overhead crane. There is some dispute in the testimony as to whether warning signs were attached to the rails.

The witness Lee Lewis testified that no signs were up when the accident occurred.

George Hite, member of the carpentry crew, testified that when Troutman was directed to climb up the steel

frame work at the end of the building to the top of the door jamb to be plumbed, that he said to Troutman "It is hot as hell up there Dutch." The witness E. W. Shilt, an employee of the Steel Contractor, Homer Rosser, Superintendent in charge of the steel construction and Robert Nalley, all warned Troutman either before he left the ground to climb up the frame work of the building or while he was up there that "those rails are hot; they will reach out and grab you." The evidence is that by the term "hot," they were referring to the charge of electricity in the rails and angle irons.

The testimony is not clear as to exactly how Troutman came in contact with the current of electricity, as no one seems to have been observing him at the exact moment of his contact, but it is undisputed that he did come in contact with the angle iron or rail and was knocked from a point from twenty to twenty-six feet high to the ground, sustaining injuries which caused his death.

Counsel for the parties agree that under the rule of Erie Railroad Company versus Tompkins 304 U.S. 64, the law as announced by the Kentucky Court of Appeals controls. See also Detroit Toledo & Ironton Railroad Company versus George G. Yeley 165 F. (2) 375 (CCA 6).

It therefore may be stated that the defenses of contributory negligence and assumed risk under the Kentucky law are, each, complete defenses.

In the case of Porter et al versus Cornett 306 Ky. 25 (29) the Court of Appeals said:

> "The doctrine of 'assumption of risk' historically arose under the general law of master and servant, and has for the most part been deemed a matter of contract. In negligence cases the same concept has been generally accepted as contributory negligence. In their legal effect, the two doctrines are identical. They deny the right of recovery where the injured person with knowledge of a dangerous situation places himself in a position where he takes the chance of being hurt. * * *"

Quoting from the case of Sutherland versus Davis, 286 Ky. 743, the Court continued:

> "The assumption of risk of a danger amounts to contributory negligence so as to bar recovery when the injured person is aware of the conditions which create the danger and in addition thereto appreciates in his own mind the danger attendant upon such conditions. * * * Where the danger attendant upon the conditions is a matter of common knowledge it will be conclusively presumed that the injured person appreciated the danger."

In the case of Green River Rural Electric Co-op Corporation versus Blandford 306 Ky. 125 (128) the Court of Appeals of Kentucky said:

> "There is no dispute as to the high degree of duty on the part of one maintaining a high voltage electric line. About the only thing certainly known about electricity is its highly dangerous character and that the greater the voltage the greater the danger. So the duty as often declared is, in short, to exercise the utmost care to prevent injury, which, however, is but to say that ordinary care in dealing with so dangerous a force is the highest degree when put into practice."

Continuing in the Green River case, the Court referred to its former opinion in Morton's Adm'r versus Kentucky-Tennessee Light & Power Company 282 Ky. 174 and reaffirmed its holding in the latter case:

> "* * * One of the factors to be considered in determining the existence of absence of negligence is reasonable contemplation of contact or injury to a person as a result of the condition created or permitted by the defendant. The test is whether it could have been reasonably foreseen or anticipated as likely to appear, taking into account the company's own past experience and the experience and practice of others in similar conditions. It is not that a particular act, which may have been unusual could have been

apprehended but whether people would come in dangerous proximity and might be expected to do any reasonable thing while there from which injury would result."

While the evidence in this case is to the effect that the building where the injury occurred had not been completed, the Harvester Company had moved into the building and was using it while in construction. A few days before the date of the accident, the current in the crane apparatus had been shut off at the request of the steel construction contractors.

The uncompleted condition of the building was notice to the Harvester Company that workmen would be engaged in and about the building until the contracts for its construction had been completed. With the building in this condition, knowledge must be imputed to the Harvester Company that workmen would be engaged in the discharge of their duties in and about that portion of the building where the rails, angle irons, and crane equipment charged with 440 volts of electricity were situated. The employees were therefore licensees and invitees and the Harvester Company owed to them the duty of exercising reasonable and ordinary care to see that the premises were free from danger, or in other words, to furnish the employees a reasonably safe place in which to perform their work. McCready versus Southern Pacific Company 26 F (2) 569 (CCA 9).

Defendants do not contend seriously upon their motion that there was not sufficient evidence on the part of the plaintiff to justify a submission of the case to the Jury, but are very earnest in their contention that the decedent was guilty of contributory negligence so as to preclude any recovery; contending that the evidence as to contributory negligence is so overwhelming as to leave no room for doubt, citing many cases in support of their contention, some of which are:

Gunning v. Cooley, 281 U. S. 90.

Atchison, Topeka & Santa Fe Ry. Company v. Toops, 281 U. S. 351.

Troutman v. Mutual Life Insurance Co. of N. Y., 125 F. (2) 769 (CCA 6).

International Harvester Company v. Langermann, 262 F. 498 (CCA 8).

They insist that that doctrine is peculiarly applicable in this case because of the rule announced by the Kentucky Court of Appeals in such cases as City of Owensboro v. York's Adm'r, 117 Ky. 294; Citizens Telephone Company v. Westcott's Adm'x, 124 Ky. 684; Capital Gas & Electric Company v. Davis, 138 Ky. 628; City of Owensboro v. Winfrey, 191 Ky. 106 and Ky. & West Virginia Power Company v. Brown's Adm'x, 281 Ky. 133.

They emphasize the warnings given Troutman before and at the time he endeavored to assist in plumbing the door jamb and contend that this case comes within the rule announced by the Kentucky Court of Appeals in cases involving injury by electricity, that a person, knowing that an appliance is charged with electricity, must not trifle with the appliance and if he voluntarily touches it and is killed or received serious injury, it cannot be said that his conduct was other than negligent so as to preclude recovery. They call particular attention to the decision of the Sixth Circuit Court of Appeals in the case of Monongehela West Penn. Public Service Company v. McNutt, 13 F. (2) 847 (CCA 6).

The Sixth Circuit Court of Appeals, in the case of Scott, *et al.* v. United States, 161 F. (2) 1009, laid down this rule with respect to a Trial Judge directing a verdict:

> "More than twenty-five years ago this court said, in Begert v. Payne, 274 Fed. 784, 487, 788 (CCA 6) 'It is a commonplace that upon a motion by a defendant for instructed verdict, it is the duty of the trial judge to give the plaintiff the benefit of every fair inference which might reasonably be drawn by the jury from the evidence, only guided by sound pro-

cesses of reasoning and applicable principles of law. The credibility of witnesses is peculiarly for the jury * * *. *A verdict cannot properly be directed for defendant merely because the trial judge feels that, should the jury find in the plaintiff's favor, he would regard it his duty, in the exercise of a sound judicial discretion to set the verdict aside.* The test is whether there is such an utter absence of substantial evidence as to make it his duty, as matter of law, to set the verdict aside independently of the exercise of discretion, and without reference to how greatly the Court may think the conflict in testimony to preponderate in favor of defendant."

Plaintiff relies upon the case of McCready v. Southern Pacific, *supra*, and the facts in that case are analagous to those in the case at bar. In that case, the plaintiff was employed as a carpenter by a contractor engaged by the Southern Pacific Company in the erection of a shop building at Los Angeles. The contractor, there, as here, was an independent contractor. Prior to completion of the building, the railroad company installed a crane operated electrically. In removing some of the scaffolding, McCready came in contact with the apparatus carrying the current of electricity and suffered severe injuries. The company there denied negligence and relied upon the defenses of contributory negligence and assumption of risk. The Court said:

"We do not recognize it to be a universal rule that an owner who invites the public to come upon his premises for business or pleasure may, in the absence of reasonable necessity, maintain thereon dangerous agencies, as wires charged with deadly currents of electricity, in such places as to endanger life and limb, and escape liability *by maintaining danger signals or otherwise advising the public.* * * *

"What reasons, if any, the defendant here may have had for connecting up the lines and sending the deadly current through the unfinished unit where men were at work, we are not advised, but, as we have the

record, the unexplained refusal to shut off the power until the scaffolding could be removed, imports little less than a wanton disregard for human life * * *

"While the defendant was under no affirmative duty to keep the premises safe for the workmen, it was under the duty to refrain from actively creating a danger." (Italics added.)

The sending of the current through the wires was compared by the Court to a blasting operation carried on by the owner of the building, such as to throw missiles with great force into the portion of the building where workmen might be expected to be working, and the Court said that the sending of the current through the portion of the building where the workmen were engaged in their employment infringed upon the rights of the employees in the same manner as would the blasting operation.

In that case, the workmen had knowledge of the proximity of the electric wires and realized that the place where he was engaged in his work was "attended with a measure of peril." The action of the Trial Court, in directing a verdict, was disapproved and the judgment so entered was reversed, the Court holding that plaintiff, as a matter of law, was not precluded by any negligence on his part; that the knowledge on his part of the presence and dangers of the charged wires was not sufficient to preclude recovery.

Counsel for Struck Construction Company have referred to the cases of Taustine's Executor v. B. & B. Novelty Company, 305 Ky. 514 and Price v. T. P. Taylor Company, 302 Ky. 736.

In the Taustine case, decedent, a man fifty-two years of age, in attempting to go from his office on the third floor of a four-story building in Louisville, by using the elevator, met his death when he opened the elevator door and stepped into the shaft, thereby falling to the basement. The Court of Appeals, in holding that his estate could not recover, said:

"When he raised the door he was facing the elevator shaft and had ample opportunity to determine

whether or not the elevator was at the third floor. Under the circumstances, we think he failed to exercise proper care for his own safety."

To my mind, there is a difference between a person coming in contact with an apparatus charged with 440 volts of electricity at a point where he is rightfully engaged in the discharge of his duties and a person attempting to enter an elevator and omitting to observe that the elevator is not at the floor level where he is attempting to enter. The elevator was conspicuously absent.

The steel work of the building of the Harvester Company and the steel work of the iron rails upon which the crane operated were of similar material and were painted the same color.

There has been no effort in this case to excuse the failure on the part of the Harvester Company to disconnect the current and thereby leave the portion of the building where the work was known to be in progress, free from the hidden danger which the high voltage created.

The motion to set aside the verdict of the Jury and the judgment entered thereon and to enter a judgment for the defendants is overruled.

In defendants' contention on the motion for a new trial, there are two troublesome questions.

Counsel does not contend that under the rule laid down by the Supreme Court in the case of McDonald and United States Fidelity and Guaranty Company v. Pless, 238 U. S. 264, a losing party, in order to secure a new trial, may use the testimony of a juror to impeach the verdict by showing that the amount of the verdict represented the quotient of the sum total of the Juror's estimates, divided by twelve. However, their contention that they should have a new trial because of newly discovered evidence gives grounds for concern.

There was nothing in the evidence to indicate that the decedent Troutman had had any experience in working around an electrical crane and stress was laid upon the

fact that he was not acquainted with such equipment and its dangers in the closing argument to the Jury by Counsel for plaintiff. It appears by affidavits, filed in support of the motion for a new trial that Troutman worked for fully a year, operating electrical equipment and work in the same room with an overhead traveling crane of the same general type as that in use at the Harvester plant at the time of his death.

The other contention is that the verdict of the Jury is contrary to the instructions, in that the Jury was instructed that if they should believe from the evidence that Troutman was informed of the hot or charged electric current and its presence there where the work was to be done and warned that the place where he was working was dangerous and that he failed to observe that warning, then the law was for the defendant, notwithstanding the Jury might believe the defendant, Harvester Company, to have been negligent in failing to provide decedent a reasonably safe place to work.

There is but one explanation sufficient to meet this last contention and that is: either that the expressions of the workmen in warning Troutman could not reasonably have been interpreted by him to refer to the high voltage irons or rails or that he did observe the warnings, but nevertheless came in contact with the rails because of their close proximity to the place where he was working.

I feel that the facts were as fully presented as could be anticipated upon another trial and that the decision of the Jury, that the death of Troutman was due to the failure on the part of the Harvester Company to remove a hidden danger from the place where they knew the work would be done by shutting off the current of electricity during the short interval of time when the carpenters' gang would be engaged in working in and about that portion of the building where they had not customarily worked, is a conclusion for which there was substantial evidence.

The motion for a new trial is overruled.

Supreme Court of the United States

October Term, 1948.

No. 792.

INTERNATIONAL HARVESTER COMPANY, Petitioner,

versus

NELLIE IRENE TROUTMAN, Administratrix of the Estate of Phillip A. Troutman, Deceased, - - - - - - - - - Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Louisville 2, Kentucky,
Attorneys for Respondent.

June 8, 1949.

WESTERFIELD-SCHITZ CO., INCORPORATED, LOUISVILLE, KY.

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Supreme Court of the United States

October Term, 1948.

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v.

NELLIE IRENE TROUTMAN, ADMINISTRATRIX OF THE ESTATE OF PHILLIP A. TROUTMAN, DECEASED, - - - - - - *Respondent.*

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

STATEMENT OF THE CASE.

Phillip A. Troutman, a resident of Louisville, Kentucky, at the time of his death on June 12, 1947, and for a number of years prior thereto, was a member of Local 64 of Falls Cities Carpenters District Council, and as such he would be assigned to work for different contractors who put in a request with the Falls Cities Carpenters Council for journeymen carpenters to be furnished to the contractor.

The International Harvester Company, on June 11, 1947, at its Louisville plant was having Building 6 constructed. The Struck Construction Company was the contractor doing the concrete work for said building, and Beasley Construction Company was the contractor doing the structural iron work on the building. On June 11, 1947, and since about December 5, 1946, Troutman was employed as a carpenter by Struck Construction Company on the Harvester job. On June 11, 1947, a channel door frame was found to be out of plumb and a controversy arose between the foreman for Struck Construction Company and the foreman for Beasley Construction Company as to what caused the door to be out of plumb. The foreman for Struck contended that the foundation was right but the steel was wrong at the top, so the foreman for Struck decided to have Struck's employee, Troutman, and his co-worker, George Hite, to climb up and to plumb the door frame.

Although Building 6 had not been completed, Harvester was using said building. Said building contained a large overhead travelling electric crane which ran on I-beams or crane girders located along each side of the building about 25 feet above the ground. Three angle irons below the crane girder supplied the electricity to the crane. The runner rail, upon which the crane wheels carrying the crane ran, was above the angle irons which were charged with electricity. The angle irons were constructed entirely differently from the runner rail which carried the crane wheels.

The rail on which the crane wheel ran, the angle irons which were charged with electricity, and the transite which covered the walls were all of the same color—a light gray or silver color. The runner rail on which the crane wheel ran was exactly like a street car rail, without being charged with any current.

Harvester knew, or should have known, that Troutman and other employees of the Struck Construction Company would be working near the angle irons charged with electricity in attempting to plumb the door frame. Harvester had two engineers, Mr. Parthemor and Mr. Newkirk, on the grounds to see that Struck Construction Company did the work properly, and these engineers talked with Mr. Williams, Struck's foreman, quite often (R., pp. 21, 22).

Before S. L. Williams, foreman for Struck Construction Company, told Troutman to go to the top of the door frame and plumb the door frame, no one for Harvester gave Mr. Williams any warning or information about the danger of the angle irons (R., p. 21).

Troutman was not told to watch or to be careful of the angle irons which were charged with electricity, but was told to watch the rails (R., pp. 78 and 79).

No one pointed out to Troutman what was "hot" up there, or told him that the angle irons were "hot" (R., p. 50).

Troutman, while plumbing said door frame at a height of some 25 feet above the ground, put his hand or foot upon the charged angle irons, received an electric shock, and fell to the ground, and as a result of the injuries sustained he died on the following day.

At a trial before a jury in the Federal District Court for the Western District of Kentucky, in an action for damages for Troutman's death which his Administratrix claimed was due to Harvester's negligence, the jury found a verdict for $17,000.00, upon which the Court entered a judgment.

II.

ARGUMENT.

Question (1) which the petitioner states is involved here is certainly an imaginary question. It is true that in the trial court and again before the Sixth Circuit, Harvester vigorously contended that Troutman was guilty of contributory negligence. Both the trial court and the Sixth Circuit were of the opinion that the question as to whether or not Troutman was guilty of contributory negligence was one for the jury. No one ever contended, either in the trial court or before the Sixth Circuit, that under the law "Federal courts cannot direct a verdict upon contributory negligence in any case." The petitioner herein is not warranted in stating that the trial court felt that this Court disapproves the direction of a verdict by any Federal trial court in any case upon the ground of contributory negligence. The trial court certainly did not express any such view orally or otherwise. The trial court took cognizance of the fact that in certain cases it was proper to direct a verdict upon the ground of contributory negligence but in other cases the question of contributory negligence was one for the jury. The trial

court wrote an opinion when the motion for a new trial was overruled and in rejecting the contention that there should be a directed verdict upon the ground of contributory negligence (R., pp. 132, 133, 134), the trial judge said:

> "Defendants do not contend seriously upon their motion that there was not sufficient evidence on the part of the plaintiff to justify a submission of the case to the Jury, but are very earnest in their contention that the decedent was guilty of contributory negligence so as to preclude any recovery; contending that the evidence as to contributory negligence is so overwhelming as to leave no room for doubt, citing many cases in support of their contention, some of which are—
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"The Sixth Circuit Court of Appeals, in the case of Scott, *et al.* v. United States, 161 F. 2d 1009, laid down this rule with respect to a trial judge directing a verdict:

"More than twenty-five years ago, this Court said in Begert v. Payne, 274 Fed. 784, 787, 788 (CCA 6):

" 'It is a common place that upon a motion by a defendant for instructed vrediet, it is the duty of the trial judge to give the plaintiff the benefit of every fair inference which might reasonably be drawn by the jury from the evidence, only guided by sound processes of reasoning and applicable principles of law. The credibility of witnesses is peculiarly for the jury. * * *'

"A verdict cannot properly be directed for defendant merely because the trial judge feels that, should the jury find in the plaintiff's favor, he would regard it his duty, in the exercise of a sound judicial discretion to set the verdict aside.

"The test is whether there is such an utter absence of substantial evidence as to make it his

duty, as matter of law, to set the verdict aside independently of the exercise of discretion, and without reference to how greatly the Court may think the conflict in testimony to preponderate in favor of defendant."

The Judges of the Court of Appeals for the Sixth Circuit who heard the argument in this case, did not suggest that this Court disapproves the direction of a verdict by any Federal trial court in any case upon the ground of contributory negligence, but during the oral argument Judge Martin did suggest to counsel that under the facts in the within case the question of contributory negligence was one for the jury. The judgment of the Sixth Circuit Court stated that it appeared that there was substantial evidence to support the verdict of the jury, and for the reasons given in the opinion of the District Judge in acting upon the motion for a new trial the judgment of the District Court was affirmed.

Unquestionably, the law in Kentucky must be followed in the Federal courts in such a case as this. Clear and undisputed contributory negligence bars recovery.

The law is well-settled in Kentucky that, under evidence similar to that proven in the within case, the trial court should not take the case from the jury upon the question as to whether the plaintiff was contributorily negligent.

In Louisville Gas & Electric Co. v. Beaucond, 188 Ky. 725, 224 S. W. 180, a trouble man for the telephone company came in contact with the electric wires on the

pole of the electric company, and he received a shock which caused him to fall 30 feet to the sidewalk below. He recovered a verdict against the electric company, and in affirming the judgment of the lower court the Kentucky Court of Appeals said:

> "Before one as a matter of law can be held to have been so contributorily negligent as to be denied a recovery because of having exposed himself to a known danger, the danger must be so imminent and obvious that a person of ordinary prudence, under like circumstances and with like knowledge, would not subject himself to it. Louisville Gas Co. v. Fry, 147 Ky. 757, 145 S. W. 748; Bowling Green Gaslight Co. v. Dean, 142 Ky. 678, 134 S. W. 1115; F. E. I. Co. v. Anglea, 142 Ky. 539, 134 S. W. 1119. There is no evidence which conduces to show that the plaintiff purposely or voluntarily came in contact with the wire of the defendant, but if his testimony is to be believed he involuntarily did so, through accident or inadvertence, and his coming in contact with it was made possible by the fact of the close proximity of the wire to the pole, and his injuries from the wire being protected with an insufficient insulation. It is also insisted by the defendant that if the plaintiff has ascended upon the other side of the pole he would have escaped coming in contact with the wire of defendant, and that he negligently ascended upon the side of the pole where it was dangerous, instead of upon the other side, where the ascent was safe. Upon the other hand, there is evidence that upon the side of the pole opposite to the wire complained of there were 12 of defendant's wires, some of which were within 4 or 5

> inches of the pole, while other evidence tended to prove that the nearest was 36 inches from the pole. There were also other wires upon the opposite side of the pole from which the plaintiff ascended—guy wires, both of the defendant and the Louisville Railway Company—and upon the whole the questions as to which side of the pole in the exercise of ordinary prudence he should have ascended became a question for the jury, and was so submitted. Upon all the facts, both those disputed and those conceded, and the inferences to be drawn from them, we conclude that the court could not have taken the case from the jury upon the question as to whether the plaintiff was contributorily negligent."

The question as to whether or not Troutman was guilty of contributory negligence was submitted by the trial court to the jury under carefully worded instructions. The jury was told that if they believed that Troutman was guilty of contributory negligence, the law in the case was for Harvester and the jury should so find.

Troutman had nothing whatsoever to do with the electrical work which was done on Building 6. Troutman was employed by Struck as a carpenter. There is nothing to warrant the conclusion that Troutman knew that when the ironworkers referred to "hot" rails they were referring to angle irons. A rail on which a wheel runs is known to the ordinary lay person as a rail. Angle irons are entirely different from the crane rail.

The proof does not show that Troutman knew that the angle irons were charged with electricity.

Troutman was not attempting to experiment. He climbed to the top of the door for one purpose only, to wit, to plumb the door. Whether or not the warnings called to Troutman were sufficient to put him on notice that what was hot and what was charged with electricity were the angle irons which were of the same aluminum color as the iron girders and the steel beams, was a question for the jury.

It is true that witnesses for the petitioner testified that Troutman was told as he went up to the top of the door that the rails were hot and to watch the rails. The structural ironworkers refer to angle irons as rails. The rail on which the crane wheels ran was not charged with electricity. There is a big difference in appearance between the angle irons and the rail. Whether or not Troutman understood what was meant when he was told to watch the rails, and that the rails were hot, was properly a question to be considered by the jury. Consider further the fact that the witnesses who testified that there were warning signs on the columns stated that the warning signs were 25 feet away from where Troutman came in contact with the rails.

The facts in the within case are entirely different from the facts in the various cases cited by the petitioner in support of the contention that Troutman's own negligence contributed to cause his death. A number of the cases cited by the petitioner deal with situations where the injured plaintiff or decedent touched or picked up a wire charged with electricity after being warned that the wire was charged with electricity.

The manner in which the girders and the angle irons were painted, the fact that transite was the same color as the angle irons and the girders, the fact that the crane rail was entirely different from the angle irons, are all facts which make it questionable as to whether or not an ordinarily careful, prudent man would understand what danger he was being warned about when he was told to watch the hot rails.

Troutman was not a trespasser. Harvester owed him the same duty as is owing an invitee. Troutman did not climb to the top of the door as a matter of choice, but because his foreman, Mr. Williams, instructed him to do so and in doing so he was carrying out work which he was employed to do. There is no proof that Troutman had knowledge of the highly dangerous character of the angle irons.

There is no proof that Troutman, with knowledge of the dangerous character of the angle irons painted the same color as metal which was free from any danger, purposely came in contact with something that he knew was charged with electricity.

POINT B. The Federal Courts Followed the Settled and Governing Decisions of the Highest Court of the State in which the Accident Occurred, and Determined a Question of Local Law in Strict Accordance With the Decisions of That Highest State Court.

The petitioner in this Court refuses to recognize that the Kentucky Court of Appeals has not held that in every case where there is any evidence of contributory negligence there should be a directed verdict.

The Court of Appeals of Kentucky has consistently and repeatedly held that in cases of injury or death by electricity, the facts of certain cases, both those disputed and those conceded and the inferences to be drawn from them, do not make the question of contributory negligence one of law, but require that the case be submitted to the jury upon the question as to whether the plaintiff was contributorily negligent.

The petitioner herein was not deprived of rights guaranteed to it under the Constitution. The trial court and the Sixth Circuit Court recognized and applied the Kentucky law as expressed by its highest court. The trial court instructed the jury that if they believed that Troutman was guilty of contributory negligence, the jury should find for Harvester. This instruction fully protected the rights of Harvester.

POINT C. The Sixth Circuit Court of Appeals Did Not Decide This Case in Direct Conflict With Courts of Appeals for the Other Circuits.

The Court of Appeals for the Sixth Circuit held with the other circuit courts that the law was the same as it has been consistently declared by the Kentucky courts. In making a contrary contention the petitioner herein refers to the case of Monongahela West Penn. Public Service Co. v. McNutt, 13 F. 2d 846. In the McNutt case high-tension wires were carried on a pole. It was known that the high-tension wires carried electricity. The Court took cognizance of the fact that it was known that these high-tension wires were dangerous because in the opinion it is stated:

> "Not only is the highly dangerous character of such wires now a matter of common knowledge but McNutt admits the warning."

Certainly there is a big difference between high-tension wires where, as a matter of common knowledge, it is known that said wires are highly dangerous and angle irons used in connection with a crane where the angle irons are painted the same color as the crane rail and the transite and the structural iron used in the building. There is absolutely no proof to show that Troutman knew that an angle iron was regarded by structural ironworkers as a rail or that Troutman knew the highly dangerous character of angle irons such as those which were charged with electricity. The Ninth Circuit has held that the question of contributory negligence was one for the jury. In the case of McCready v. The Southern Pacific Company, 26 F. 2d 569 (CCC 9), the facts are strikingly similar to the facts in the within case. Troutman was an employee of an independent contractor engaged in constructing Building 6 for Harvester. McCready was an employee of an independent contractor who was engaged in constructing a shop building for the railroad. The building was partially completed, and there was an overhead crane which ran the length of the building. The railroad company had turned the current on and the wires giving power to the crane were charged. The company had placed large signs at various spots, giving warning of the hot wires. McCready was directed by the contractor to remove certain scaffolding with the knowledge that the wires were "hot" and while so doing came in contact with the wires and was injured.

The Court held that the maintaining of danger signals or otherwise advising the public of the presence of wires charged with electricity was not sufficient to enable the company to escape liability, and the question of the defendant's negligence was one for the jury. Although McCready had knowledge of the presence and danger of the charged wires the Court held that he was not guilty of contributory negligence as a matter of law.

Certainly there is no conflict between the Sixth Circuit Court of Appeals and the other circuits with reference to submitting the question of contributory negligence to the jury.

POINT D. The Denial of a Motion for a New Trial in This Case Did Not Permit a Recovery Upon a Complete Misrepresentation Permeating the Entire Case.

Harvester did get a fair trial and respondent's entire case was not presented to the Court and the jury based on a misrepresentation and the true facts were not concealed from Harvester, the Court and the jury before and throughout the trial.

Counsel for Harvester took the deposition of Troutman's widow and knows that she is an humble, uneducated person, and to charge her with misrepresentation is a rather harsh thing. Harvester's counsel does not suggest that plaintiff's counsel participated in any misrepresentation or knew any facts which could in any way mislead or misrepresent the truth. As is shown on page 113 of the record, Troutman, for a number of years, was a member of the Carpenter's

Union and worked for different contractors as a carpenter. In her deposition Mrs. Troutman testified that during nearly all of their married life her husband worked for a member of the Contractors Association. Evidently before the deposition was taken Harvester's counsel made an investigation as to where Troutman had worked and asked Mrs. Troutman whether he had worked for certain named contractors (R., p. 114). Mrs. Troutman certainly was frank and honest in her answers. Answer 15, page 112, Record, shows that she stated that when they were married her husband was working for Ewing-Von Allmen Dairy Company in the freezing room, freezing ice cream.

Petitioner contends that Troutman was experienced as crane operator and electrical machinist. As far as Mrs. Troutman knew, her husband had not been a crane operator and was not an experienced electrical machinist. As far as she knew, he worked in the ice cream room for Ewing-Von Allmen Dairy Company and then had worked as a carpenter for different contractors. Petitioner criticizes the testimony of Mrs. Troutman because when she testified she did not mention that her husband had worked for Tube Turns. It is hard for a lay person to understand how a member of the Carpenters' Union would be working as an electrical machinist. It is common knowledge that there are jurisdictional disputes between different crafts. Mrs. Troutman knew that all during the war period her husband was a member of the carpenter's union and certainly she had no reason to believe that he was a machinist or that he knew anything at all about cranes.

If one is a machinist, it does not necessarily mean that he understands the mechanism of an overhead crane which is operated by current from angle irons.

There was no proof before the lower court that Troutman was a qualified person within the meaning of the safety code. The engineer, Sanders, testified that under the National Electrical Code a qualified person would be an electrician (R., p. 42). Troutman was not an electrician, and although the appellant contends in its brief that Troutman had operated a similar electrical crane himself, there is no proof that Troutman ever operated a crane to which electricity was supplied through angle irons. Troutman was never employed as an electrician, and was never employed as an operator of a crane. If Troutman ever did operate the crane at Tube Turns, he certainly did not operate it as a qualified crane operator, and operated it only when the regular operator was not present. At the most, it could not have been but on several occasions, because, according to the affidavits filed by the appellant, Troutman worked in the tool and die shop as a machinist. This Court knows that many girls and women work in factories where power machines are operated through electricity, and certainly a female operator of an electric power machine would not be considered as a qualified electrician or a qualified electrical crane operator.

The trial judge gave earnest consideration to petitioner's contention that it should have a new trial because of newly discovered evidence. In the exercise of a sound discretion the trial judge, in denying a new

trial on the ground of newly discovered evidence (R., pp. 137, 138) said:

> "I feel that the facts were as fully presented as could be anticipated upon another trial and that the decision of the Jury, that the death of Troutman was due to the failure on the part of the Harvester Company to remove a hidden danger from the place where they knew the work would be done by shutting off the current of electricity during the short interval of time when the carpenters' gang would be engaged in working in and about that portion of the building where they had not customarily worked, is a conclusion for which there was substantial evidence.
>
> "The motion for a new trial is overruled."

The opinion of the trial court is supported by the evidence introduced at the trial and the conclusions arrived at by the trial judge are logical and sound.

CONCLUSION.

It is, therefore, respectfully submitted that this case is not a proper one for review by certiorari in this Court, and that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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HERMAN COHEN,
Counsel for Respondent.

Dated June 8, 1949.